

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIK MOORE,

Defendant-Appellant.

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UNPUBLISHED

November 28, 2006

No. 262960

Wayne Circuit Court

LC No. 04-010553-01

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his waiver trial conviction of resisting arrest, MCL 750.81d. Defendant was also charged with attempting to disarm a police officer, MCL 750.479b(2), and domestic violence, MCL 750.81(2). However, the court dismissed the charge of domestic violence, and acquitted defendant of attempting to disarm a police officer. Defendant was sentenced to one year probation. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that he was denied the effective assistance of counsel. We disagree. To prevail on a claim of ineffectiveness of counsel, defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, and that but for trial counsel's errors, there would have been a different outcome. *People v Pickens*, 446 Mich 298, 314, 326; 521 NW2d 797 (1994).

Officers Vernon Marcum and John Ruth went to defendant's home on a domestic violence call. Ruth remained outside with defendant while Marcum went inside to talk with defendant's wife. Then they switched, and Ruth went in to talk to defendant's wife. When Ruth came out of the home, he attempted to arrest defendant and place him in handcuffs, but defendant resisted. Defendant argues that trial counsel did not provide effective assistance because he failed to present an audio tape of the interaction between his wife and the officers while inside the home.

Because defendant did not move for a new trial or evidentiary hearing before the trial court, this Court must review this issue on the basis of the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defendant was convicted of resisting arrest, MCL 750.81d. Under this statute, “a person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal under the circumstances of the occasion.” *People v Ventura*, 262 Mich App 370, 377; 686 NW2d 748 (2004). Defendant clearly knew that Ruth and Marcum were police officers. The evidence shows that Ruth advised defendant he was under arrest, and told him to put his hands behind his back, and that defendant did not comply. After failing to secure both defendant’s arms behind his back, the officers had to take defendant to the ground, and after several minutes of struggling, were finally able to handcuff him. The trial court found that defendant slowed down the process of the officers handcuffing him, obstructing their efforts to place him under arrest.

The audio tape is not a part of the existing record, but there is also no indication that introduction of the alleged audio tape into evidence would have produced a different outcome. Even if the tape contains the conversations between the officers and defendant’s wife, the only evidence that may be brought to light is the reason Ruth decided to arrest defendant. This reason is not relevant to defendant’s conviction of resisting arrest. Defendant was convicted based on his conduct outside of the house while he was being placed under arrest, and whether his arrest was illegal is not a statutory element under MCL 750.81d. *Ventura, supra* at 377. Further, there is no basis upon which to assume that the tape would have been helpful in defendant’s defense.

Affirmed.

/s/ Helene N. White

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly